Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAY 3 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Leased Commercial Access	MM Docket No. 92-266 CS Docket No. 96-60

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS
of
OUTDOOR LIFE NETWORK
SPEEDVISION NETWORK
THE GOLF CHANNEL
BET ON JAZZ

Burt A. Braverman
Maria T. Browne
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750

May 31, 1996

No. of Copies rec'd 0+4

44159.1

TABLE OF CONTENTS

SUMMARY

Outdoor Life Network, Speedvision Network, The Golf Channel, and BET on Jazz (collectively, "Programmers") are diverse, start-up programming networks that have collectively invested hundreds of millions of dollars in the production of quality programming and that are likely to be displaced by leased access users if the Commission adopts the cost/market formula proposed in the *NPRM* or any formula that substantially reduces leased access rates and artificially spurs demand for leased access channels. Programmers, therefore, strongly oppose the Commission's adoption of the cost/market formula or any revisions to the current implicit fee formula that would substantially reduce leased access rates.

The cost/market formula proposed by the Commission seriously understates the market value of a cable system's channel because it fails to account for the value to the cable system of filling that channel with programming that attracts and retains subscribers. The Commission's low estimate of a channel's worth is reflective of its intent to reduce leased access rates to ensure that cable systems' set asides are filled, despite the statute's more limited mandate to the Commission to simply inject structure and certainty into the leased access negotiation process by establishing, in advance, the market value of a channel. Nevertheless, if the Commission is determined to revise the current implicit fee formula such that its underlying economic logic is more sound, Programmers support the revisions proposed in Comments filed by the National Cable Television Association ("NCTA"), which more accurately reflect the true value of a channel than does the cost/market formula.

If Programmers are to withstand any reduction in leased access rates and corresponding increase in demand for leased access channels, the Commission must adopt a

transition plan that enables start-up programming networks to increase distribution to 20 to 25 million subscribers, the level of distribution necessary for Programmers to become commercially viable. Programmers have proposed a transition plan that would begin phasing in any revised rate formula after a one year hiatus, during which Programmers and other similarly situated networks would be able to proceed with imminent launches and negotiations for carriage. After one year, the transition plan would phase in rates for cable systems with between 72 channels and 130 activated channels over the ensuing five years at gradually increasing rates, based on the system's channel capacity and any expansions thereof. Cable systems with 72 or fewer activated channels, on which new start-up networks historically have had difficulty gaining carriage, would be exempt from the phase-in until they expanded channel capacity to greater than 72 activated channels or at the expiration of six years, whichever occurred first. Under the proposed transition plan, cable systems with greater than 130 activated channels would not be governed by the transition and would have to comply with the new formula immediately.

Alternatively, if the Commission does not adopt an adequate transition period, the Commission must clarify that start-up networks that launched in reliance upon then-extant channel capacity and expectations of growth in channel capacity, and the Commission's original leased access rules, satisfy cable systems' channel set-aside requirements notwithstanding the fact that such networks are paid for carriage. There is nothing in Section 612 that prohibits start-up networks from satisfying leased access set-aside requirements or that prevents leased access programmers from being paid for carriage. Nor is there any support for preferential treatment for non-profit or local programming.

In sum, the Commission should carefully consider the wisdom of a leased access rate formula that would displace Programmers and nearly 100 other recently launched programming networks with home shopping, infomercials and other such quality programming. That result cleary would not further Congress' goal of promoting numerous, diverse sources of quality programming.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	MM Docket No. 92-266
	CS Docket No. 96-60
Leased Commercial Access	

REPLY COMMENTS OF OUTDOOR LIFE NETWORK, SPEEDVISION NETWORK, THE GOLF CHANNEL, AND BET ON JAZZ

Outdoor Life Network ("Outdoor Life"), Speedvision Network ("Speedvision"), The Golf Channel, and BET on Jazz ("BET") (collectively, "Programmers"), submit the following Reply Comments, in which they respond to the comments filed by others on May 15, 1995 concerning the *Further Notice of Proposed Rulemaking* ("*NPRM*") in the captioned matter.

I. INTRODUCTION

In comments filed by Programmers on May 15, 1996 ("*Programmers' Comments*"), Programmers demonstrated that the leased access rate formula proposed by the Commission in the *NPRM*, which effectively subsidizes leased access use, would have a disastrous impact on diverse start-up programming networks, such as Programmers, that collectively have invested hundreds of millions of dollars in the creation, marketing and distribution of high quality, niche programming services in reliance upon the extant channel capacity available on the Nation's cable systems under the FCC's existing leased access and other regulations. Programmers questioned both the Commission's authority to promote leased access use through subsidized rates and the wisdom of a rate formula that would result in displacement of new, truly diverse, high quality programming networks by home shopping, infomercials and other comparable leased access users.

Programmers also addressed other issues raised by the *NPRM*. Programmers recommended that, for the benefit of subscribers, full-time programming of any kind should receive priority over part-time programming. In addition, Programmers challenged the statutory authority for providing preferences to nonprofit entities and LPTVs. Programmers also recommended against a selection process based solely on first-come, first-served, and suggested, instead, reliance on neutral criteria upon which cable operators could base their decisions as to which leased access users to select.

Finally, Programmers offered two contingent proposals for the Commission to consider if, and only if, it decides, against the overwhelming advice of commenting parties, to adopt the *NPRM*'s proposed rate formula or a similar rate formula that reduces leased access rates below the full market value of a channel. First, in such event, Programmers proposed that the Commission must also, at a minimum, adopt a transition provision that takes into account the enormous investments of quality programming networks and ties any reduction in leased access rates to significant increases in available channel capacity. Alternatively, Programmers recommended that the Commission clarify that cable operators' carriage of start-up, quality, unaffiliated programming networks, such as Programmers, count towards satisfaction of cable systems' leased access set-aside requirements, notwithstanding the fact that the programming networks are paid by the cable operators for carriage.

None of the comments filed in support of the Commission's proposed revision of the leased access rate formula offered a credible argument justifying the displacement of diverse, quality, full-time programming networks with leased access users. Nor did any comments offer authority for the Commission to subsidize leased access to ensure full *use*, as opposed to *availability*, of the set-aside requirements. Indeed, the comments of entities that support leased access subsidies were generally devoid of any legal or evidentiary support that would justify their requests. For example, various leased access users recommended per subscriber fees ranging from \$.01 to \$.10.[1] but, apart from the fact that these arbitrary amounts produce rates that they would prefer to pay, leased access users offered no support for their proposals.

Moreover, it is apparent from the comments that the majority of entities that support the Commission's new rate formula are those that have not been able to secure carriage in the marketplace, either because the quality of their product is poor or the market for their product is already saturated. The remaining advocates of subsidized leased access admit that they have developed programming specifically "designed" for leased access -- i.e., infomercial programming -- and would prefer even lower rates for part-time carriage than the bargain rates presently available.[2] For both groups, leased access is simply an artificial, inexpensive leg-up for carriage. Not surprisingly, it is these entities that also urged the adoption of

---

[1]*See, e.g., Comments of United Broadcasting Corp. d/b/a Telemiami* at iv (recommending "nominal rate between \$.01 and \$.05 per subscriber per month"); *Comments of Blab TV* at 6 (recommending leased access rates "in the \$.04 to \$.08 per subscriber per month range"); *Comments of The Vacation Channel, Inc.* at 3 (recommending \$.10 per subscriber per month).

[2]*See, e.g., Comments of Lorelei Communications, Inc. d/b/a The Firm* at 1.

preferences for their particular classes of programming as against other potential classes of leased access users.[3]

In contrast, the comments filed by programmers opposing a subsidized rate were extremely diverse, ranging from well established programmers such as ESPN, Inc., to start-up programmers such as Programmers, to wholly independent programmers such as Lifetime, to ethnic programmers such as BET on Jazz and the International Channel, to local, publicly supported programmers such as Pennsylvania Cable Network and PBS Horizons. These diverse, quality programming networks share a common trait -- each obtained carriage on cable systems without the assistance of leased access because of the high quality of its programming, and each stands to lose tremendously, along with the viewing public, if leased access usage is subsidized through the adoption of below-market leased access rates.

II. PROGRAMMERS SUPPORT THE RATE FORMULA PROPOSED BY NCTA

First and foremost, Programmers strongly oppose the Commission's plan to reduce leased access rates to ensure that leased access set-asides are filled. Although Programmers did not address the specific flaws of the proposed cost/market formula, or propose an alternative formula in their Comments, Programmers reminded the Commission of the limits

---

[3]For example, LPTV commenters generally are opposed to preferences for nonprofits and part-time carriage. *See, e.g., Comments of Community Broadcasters Association* at 11; *Comments of The Vacation Channel* at 3. Similarly, for-profit leased access users are opposed to preferences for nonprofits. *See, e.g., Comments of United Broadcasting Corp. d/b/a Telemiami* at 16; *Comments of The Game Show Network, L.P.* at 29-31. And, some leased access users have recommended blanket preferences for their type of programming. *See, e.g., Comments of Visual Information Providers for Non-Discriminatory Access ("VIPNA")* at 8 (recommending that local programming be given first priority to leased access channels).

imposed on its delegated authority, which constrain it to set maximum rates "that will not adversely affect the operation, financial condition, or market development of the cable system" and of the numerous start-up programming networks that have recently emerged in satisfaction of Congress' goal of diversity. While the Commission certainly may fine-tune its rate formula to ensure that its underlying logic is economically sound, Programmers dispute the Commission's authority to set rates below the *true* market value of a channel.

Programmers agree with the National Cable Television Association ("NCTA") that the Commission, in setting the maximum rates that cable operators may charge for leased access carriage, must consider the true value of the channel to the cable operators. *Comments of the National Cable Television Association, Inc. ("NCTA Comments")* at 7. Programmers also agree with NCTA that the Commission's initial implicit fee formula was much closer to satisfying this requirement than is the cost/market formula proposed by the Commission in the *NPRM*. *Id.* at 18-21. As fully explained by NCTA, there are substantial intangible costs that leasing a channel imposes on cable operators that are not recoverable under the cost/market formula. *Id.* Most significantly, taking away an operator's ability to program a channel is likely to affect its revenues adversely. *Id.* at 19; *see also Comments of Tele-Communications, Inc.* at 17 (discussing a survey of subscribers in which 80% responded that the loss of designated quality programming would substantially lower the value of their cable television service). Indeed, Programmers would not have invested millions of dollars in their programming to date if subscribers did not value the quality of their programming.

Programmers also agree with NCTA that the Commission's theory that the implicit fee formula gives the cable operator a double recovery of subscriber revenues is flawed. *NCTA*

Comments at 19. Programmers have invested millions to create high quality, diverse programming on the fundamental premise that subscribers place a value on what they are watching. *See Programmers' Comments* at 18; Affidavit of Roger Williams at 6; Affidavit of Christopher R. Murvin at 5-6; Affidavit of Jefferi K. Lee at 4-5.[4] The Commission is simply wrong in assuming that displacing Programmers' and other start-up networks' programming with more home shopping or infomercial channels will not cheapen the value of a cable operator's programming package and ultimately force the operator to reduce the overall price of the package. Even if cable operators do not reduce the price of their overall program packages, it is still wrong to assume that the same amount of cable operator revenue per subscriber may be attributed to leased access programming as to quality programming networks. Indeed, if the implicit fee had truly allowed cable operators to double-count revenues, operators would have been eager to lease channels immediately. *NCTA Comments* at 19.

Programmers support NCTA's proposed rate formula, which advocates retention of the implicit fee formula with revisions. *Id.* at 22. NCTA's proposed revisions, which require the operator to subtract the average programming costs instead of the lowest programming cost (an amount that always came out to zero), and to divide this product by the total number of channels on basic and tier, more accurately reflect the true value of a system's average

---

[4]While quality programming networks have invested millions in their programming, the investment of leased access users in the quality of their programming is slight in comparison. *See, e.g., Comments of Lorilei Communications, Inc. d/b/a The Firm* at 16 (stating that infomercial programming is becoming more affordable to produce, and estimating cost of the necessary infomercial production facilities to be only $100,000).

channel.[5] *NCTA Comments* at 22. An implicit fee formula based on average program costs eliminates the need for cable operators to predesignate channels because the leased access rate would not be dependent upon any particular programmer's fee structure. Programmers are opposed to a rate formula that requires operators to predesignate channels to be dropped, as such predesignation is likely to be most harmful to start-up networks, the ones likely to be designated.[6] Moreover, under a formula based on average costs, cable systems would not be able to manipulate the formula by designating high cost programmers for being bumped, thus alleviating the concerns of several commenters. *See, e.g., Comments of Center for Media Education, et al.* ("*CME Comments*") at 11; *Comments of Visual Media Productions* at 6.

For all of these reasons and those stated in the *NCTA Comments*, Programmers urge that, if the Commission concludes that it must revise the current maximum implicit fee formula, it adopt the modified implicit fee formula proposed by NCTA, not the cost/market formula proposed by the Commission in its *NPRM*.

---

[5]Interestingly, a leased access user, Lorelei Communications, Inc. d/b/a The Firm, also proposes that the Commission retain the implicit fee formula with an adjustment based on cable system's average programming costs. *Comments of Lorelei Communications, Inc. d/b/a The Firm* at 7.

[6]Predesignation of channels is particularly unfair to the programming networks occupying the channels that may eventually be utilized for leased access. Cable systems are likely to drop the most recently added programming networks first, since these networks will not have been on the system long enough to develop the subscriber loyalty of more established networks such as ESPN, Inc. *See Comments of Continental Cablevision, Inc.* at 20. In slating these start-up programming networks for removal at the outset, cable operators would not take into account increases in these new channels' popularity likely to develop over time and would substantially impede any motivation for these programming networks to continue producing quality programming. Moreover, once cable operators designated a programming network to be dropped, that network's advertising revenues would be seriously jeopardized.

III. IF A REVISED FORMULA IS ADOPTED THAT REDUCES LEASED ACCESS RATES, IT IS IMPERATIVE THAT THE COMMISSION ALSO ADOPT A TRANSITION PROVISION TIED DIRECTLY TO INCREASES IN CABLE SYSTEMS' CHANNEL CAPACITY

Given the potentially devastating impact that the Commission's proposed rate formula would have on start-up programming networks, it is imperative that the Commission not adopt that formula, or indeed any revised formula that has the effect of lowering leased access rates, without incorporating a meaningful transition provision. A transition that merely phases in the new rate formula to all new channels as they are added by a cable system, no matter what size the system or how many channels are being added, would not sufficiently protect start-up programming networks whose attainment of distribution goals -- and ultimate survival -- are dependent upon the networks being able to share in increases in cable systems' channel capacity. Moreover, a transition that phases-in the Commission's cost/market formula too rapidly (*e.g.*, within the three year period cited by way of example in the *NPRM*[7]) would not shelter start-up networks from the potentially fatal impact that the Commission's proposed formula will otherwise have on those networks' acquisition of distribution in their crucial early years of operation.

Accordingly, Programmers propose that any formula adopted by the commission that reduces leased access rates from the maximum implicit fee level be accompanied by a transition provision that delays for one year implementation of the revised formula by systems having fewer than 130 channels, and that then phases-in application of the new formula in a

---

[7]*Further Notice of Proposed Rulemaking,* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation -- Leased Commercial Access, MM Docket No. 92-266, CS Docket No. 96-60, FCC 96-122 (released March 29, 1996) at ¶ 99.

manner that is tied to expansions in cable systems' channel capacities. Specifically, Programmers propose that, should the Commission adopt its cost/market formula, it include a six-year transition provision that exempts systems from the new formula until they surpass 72 channels; that exempts all systems having fewer than 130 channels during the first year of the transition period; and that then phases in the application of the new rate formula to each system's leased access channel set-aside allotment over the ensuing five years of the transition period at a gradually increasing rate, based on the system's channel capacity and any expansions thereof. In selecting which leased access users would be afforded access at reduced rates, cable systems should be afforded discretion to consider such important neutral business criteria as the desirability of that type of programming to its subscribers, the impact on the system's overall channel line-up, and the willingness of the programmer to enter into a long-term contract. *See Programmers' Comments* at 37.[8]

A six-year phase-in period makes eminent sense. Programmers founded their business plans on the expectation that cable systems would increase channel capacity over the next ten years. Second Affidavit of Roger Williams, May 31, 1996 ("Second Williams Aff.") at ¶ 3; Second Affidavit of Christopher R. Murvin, May 31, 1996 ("Second Williams Aff.") at ¶ 3; Second Affidavit of Jefferi K. Lee, May 31, 1996 ("Second Lee Aff.") at ¶ 3. Programmers' assumptions were not unlike those of the Commission, which has calculated that cable systems have historically added channels at an average rate of 2.4 channels per year and, in adopting its "going-forward" rules, encouraged cable systems to add an average of three new

[8]A selection process based solely on first-come, first-served, would be inconsistent with Congress's intent to allow cable operators to establish price, terms, and conditions that are discriminatory. *See NCTA Comments* at 31.

channels per year going forward. *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd. 1226 (1994) at App. C, 1316-19. Second Williams Aff. at ¶ 3; Second Murvin Aff. at ¶ 3; Second Lee Aff. at ¶ 3. While Programmers understood that at least 100 new programming networks would be vying for carriage on these newly added channels, they could not have predicted that the Commission would propose to mandate virtually free access to a substantial portion of these additional channels by a select group of leased access users.

Under the Commission's proposed formula, Programmers' original projections that they would attain sufficient distribution to reach break-even in years four to five would have to be revised substantially; for the number of channels available to Programmers and nearly 100 similarly situated start-up networks would be significantly reduced, causing Programmers' original projected break-even dates to be extended by a number of years. Second Williams Aff. at ¶ 5; Second Murvin Aff. at ¶ 5; Second Lee Aff. at ¶ 5. Faced with such continuing losses, Programmers and numerous other start-up networks would either run out of capital, lose the financial backing of their investors, or be forced to simply cease operation to stem the continuing tide of operating losses. *Id.*

It is these factors that lead Programmers to propose the following six-year transition provision, in the event that the Commission decides to adopt its proposed rate formula:

(a) **The new rate formula would not apply to any cable system in year one of the transition period.** A reprieve in year one would allow the industry to move forward with imminent plans already in the pipeline, unimpeded by regulations. For example, Programmers are presently scheduled to be launched on, and are in carriage negotiations with, a number of systems. Second Williams Aff. at ¶ 9; Second Murvin Aff. at ¶ 9; Second Lee Aff. at ¶ 9. These launches and negotiations could, and likely would, be derailed if the Commission's proposed formula were to become immediately applicable to cable operators. *Id.* The Commission should defer application of the new formula by one year to permit these launches to go forward, and to allow the conclusion of pending carriage agreement negotiations. *Id.*

(b) **Systems with fewer than 72 or fewer activated channels should not be required to apply the new rate formula to any leased access channels until they expand above 72 channels or by the end of year 6, whichever occurs first.** Cable systems with 72 or fewer channels have limited capacity to add any of the nearly 100 new programming networks that have recently launched.[9] Such systems' channels are already occupied virtually entirely by must-carry and PEG programming, by established cable networks, and by premium and pay-per-view channels. Second Williams Aff. at ¶ 8; Second Murvin Aff. at ¶ 8; Second Lee Aff. at ¶ 8. If these systems were required to phase in the Commission's cost/market formula before the end of year six, or before these systems expanded to more than 72 activated channels, they would have no channels left with which to commence carriage of new, start-up programming networks such as Programmers. *Id.* Moreover, those systems of this size that have already added a few start-up networks would likely have to bump those new networks to make room for expanded leased access carriage. *Id.*

(c) **For systems that have, or that increase the number of channels to, above 72 but below 90 activated channels, the phase-in should begin in year 2 with 10% of the system's leased access set-aside channels being subject to the new formula by the end of the year, and the remainder being governed by the prior maximum implicit fee formula. By the end of year 3, an additional 15% (for a total of 25%) of the system's leased access set-aside channels would be subject to the new formula; by the end of year 4, an additional 20% (for a total of 45%) of the system's leased access channels would be subject to the new formula; by the end of year 5, an additional 25% (for a total of 70%) would be subject to the new formula; and by the end of year 6, an additional 30% (for a total of 100%) of the system's**

---

[9]Indeed, these systems rarely add new networks and generally are still at the phase of adding the more established networks such as A&E or Discovery. Second Williams Aff. at ¶ 8; Second Murvin Aff. at ¶ 8 Second Lee Aff. at ¶ 8.

leased access channels would be subject to the new formula.[10] Systems in this size grouping would likely be most impacted by the Commission's proposed cost/market formula in their ability to carry start-up networks. Systems with smaller channel capacities are generally channel-locked, and already have limited ability to add new networks. Second Williams Aff. at ¶ 10(a); Second Murvin Aff. at ¶ 10(a); Second Lee Aff. at ¶ 10(a). Systems with 90 or more channels would have a somewhat greater ability to add networks even in the face of more burdensome leased access requirements. But systems in this size grouping -- between 73 and 89 channels -- which presently have some capacity to add Programmers and other start-up networks, likely would be foreclosed from doing so if that available channel capacity were required to be directed immediately to preferred leased access providers. *Id.*

(d) **For systems that have, or that increase the number of channels to, above 90 but below 130 activated channels, an accelerated phase-in rate would apply. The phase-in for such systems would be implemented in the same manner as the phase-in for systems having channel capacity between 73 and 89 channels, except that the percentages would be increased by 5 percentage points per year in years 2 through 6.**[11] Systems of this size, like systems

---

[10]For example, a system with 38 activated channels at present, with 6 channels occupied by must-carry stations, has a set-aside requirement of 4 channels. Until that system expands its channel capacity above 72 activated channels, it would apply the current maximum implicit fee formula to all four channels. If the system were to increase to 75 activated channels in 1999, with the same number of must-carries, it would have a set-aside requirement of 11 channels. By the end of year 1999, the system would apply the new rate formula to 25%, or 2.75, of its 11 leased access channels. By the end of the following year, 2000, the system would apply the new rate to an additional 20% (for a total of 45%) of the system's leased access channels, i.e., to 4.95 channels. By the end of the next year, 2001, the new rate would apply to an additional 25% (i.e., to 70%), of the leased access channels to 7.7 channels. And by the end of year 6, the new leased access formula would apply to all 11 channels. Unless the Commission decides to implement a rate formula for part-time carriage that is different from that applied to full-time programming, the Commission should apply the new formula to fractional channels and should not round up the requirement.

[11]For example, if the system discussed in the previous example (*see supra*, note 10) with 38 channels, 6 of which were must-carry channels, increased to 100 channels in year 2000, its leased access set-aside requirement at 100 channels would be 15 channels. By the end of year 2000, it would be required to apply the new rate formula to 60%, or 9, of those

having between 73 and 89 channels, are critical to the distribution growth of start-up programming networks. Second Williams Aff. at ¶ 10(b); Second Murvin Aff. at ¶ 10(b); Second Lee Aff. at ¶ 10(b). However, because these systems already have somewhat greater channel capacity, it would be possible for them to shoulder carriage of a somewhat greater number of leased access channels than systems of lesser channel capacity, without jeopardizing their ability to launch, or continue carrying, start-up networks such as Programmers. *Id.*

(e) **Systems that have, or increase their number of channels to, 130 or more activated channels would be immediately subject to the most accelerated application of the new formula to all of their leased access channels.** Systems of this size would appear to be able to accommodate the Commission's proposed cost/market formula, while still launching start-up networks. Second Williams Aff. at ¶ 11; Second Murvin Aff. at ¶ 11; Second Lee Aff. at ¶ 11. Therefore, under Programmers' proposed transition plan, systems of this size would be required to comply immediately with the Commission's revised formula.

Several Commenters argue that because a petition for reconsideration of the Commission's initial rules has been pending for three years, programming networks have had sufficient notice that the rate formula might change, and that therefore, any investments that programming networks have made in reliance upon the Commission's original rules are irrelevant. *See, e.g., Comments of ValueVision* at 21; *Comments of VIPNA* at 13. This argument provides no more justification for denying start-up networks a fair transition than it does for adopting the Commission's proposed formula in the first instance. First, programming networks had no reason to expect that the Commission would fundamentally change the leased access rate formula in a manner that would reduce rates ranging from

---

channels. By the end of year 2001, it would be required to apply the formula to 90%, or 13.5, of its 15 channel leased access set-aside. And by the end of year 2002, all 15 channels would be subject to the new formula.

$5,000 to $30,000 per month under the maximum implicit fee formula to virtually 0 under the cost/market formula, thus precipitating an artificially induced surge in demand for leased access channels. Second, Congress's and the Commission's actions in other contexts, such as the program access provisions in the 1992 Cable Act, 47 U.S.C. § 548, and the Commission's "going forward" rules, 47 C.F.R. § 76.922(g), have encouraged the development of new, diverse program services. Thus, notwithstanding the pendency of a petition for reconsideration in the leased access proceeding, Congress and the Commission were encouraging new program networks to forge ahead with their investments in new, diverse programming, and the Commission should not now penalize start-up programmers by pulling the rug out from under those investments. Moreover, if the entire cable programming industry had remained dormant in anticipation of a possibility that the leased access rate formula might change, and the nearly 100 new programming networks that have launched since the Commission's leased access rules were released had decided not to go forward, subscribers would have been the primary losers.

In short, in reliance on the Commission's existing leased access regulations, Congress's and the Commission's encouragement, and the channel availability then-existing nationwide, Programmers and other start-up networks invested hundreds of millions of dollars to provide the American public with nearly 100 new networks designed to meet unserved, and underserved, viewing needs. If the Commission decides to adopt its proposed cost/market formula, which Programmers strenuously oppose, then it is imperative that the Commission also adopt the transition provision proposed above. Indeed, if the Commission adopts *any* revised leased access formula that reduces rates below the current maximum implicit fee formula, Programmers submit that the Commission must also adopt an adequate transition period, in order to ensure that the investments of Programmers and other start-up networks, and the viewing needs of the American public, not be jeopardized.

IV. ALTERNATIVELY, IF A REVISED RATE FORMULA IS ADOPTED, THE COMMISSION MUST ALSO PROVIDE THAT CARRIAGE OF START-UP NETWORKS, SUCH AS PROGRAMMERS, WILL SATISFY CABLE OPERATORS' LEASED ACCESS PROGRAMMING REQUIREMENTS

Programmers demonstrated in their Comments that the adoption of a subsidized rate formula is inconsistent with the statute, would eliminate channel capacity for start-up programming networks, and would ultimately be the cause of new programming networks' demise. Accordingly, Programmers proposed that, if the Commission were to adopt a rate formula that is intended to ensure that all leased access set-asides are filled, then fairness would dictate that carriage of start-up programming networks, such as Programmers, should be considered to satisfy cable systems' commercial leased access set-aside requirements.

Commenters based their proposal on the language of Section 612, which contains few restrictions on the types of programmers that may qualify for leased access carriage. Under Section 612, a video programming provider qualifies for leased access carriage as long as it is "unaffiliated with *the* cable operator" on which the programmer is seeking carriage, 47 U.S.C. § 532(b)(1) (emphasis added), and was not on the system at the time Section 612 was enacted, 47 U.S.C. § 612(c)(3). The fact that programming is for profit or nonprofit, or is local or national in nature, is irrelevant under the statute.

A. "Affiliated" Refers To The Particular Cable Operator On Which The Programmer Seeks Carriage

Significantly, Section 612 does *not* prohibit programmers in which *any* cable operator holds an ownership interest from seeking leased access carriage on unaffiliated cable systems. Congress's use of the term "the" to modify "cable operator" clearly indicates that Congress did not intend to sweep so broadly as to include programmers in which *any* cable operator holds an attributable interest.[12] Indeed, where Congress has sought to regulate the ownership interests of *any* cable operators in programmers, it has done so explicitly. *See, e.g.*, 47 U.S.C. § 548 (referring throughout to "a satellite programming vendor in which *a* cable operator has an attributable interest") (emphasis added).

The Commission reached a similar conclusion in promulgating channel occupancy limits for vertically integrated programming, which conclusion is dispositive here. *Second Report and Order, Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd. 8565 (1993)("*Vertical Ownership Report & Order*"); 47 C.F.R. § 76.504. In issuing its channel occupancy limits for programmers affiliated with cable operators, the Commission determined that it was unclear from the statutory language and the legislative history, which referred to "a video programmer in which *a* cable operator has an attributable interest," 47 U.S.C. § 533(f)(1)(B) (emphasis added), how Congress intended its channel occupancy limits to apply. *Vertical Ownership Report & Order* at ¶ 46. The Commission concluded that "the

[12]"[I]t would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the.' The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object. . . . 'The' house means only one house." Black's Law Dictionary (4th Ed. 1968) at 1647 (citations omitted).

most logical interpretation of the statutory language is to apply such limits only to video programmers that are vertically integrated with the *particular* cable operator in question." *Id.* at ¶ 52 (emphasis added). In reaching this conclusion, the Commission found that cable operators have very little incentive to favor, or ability to control, video programming services that are affiliated solely with a rival MSO. *Id.* at ¶ 53. The same is true in the case of leased access. Indeed, the Commission clearly stated in that *Order* that "the leased access requirements are parallel in purpose to the [vertical integration] channel occupancy requirements." *Id.* at ¶ 69.

Several commenters address the issue of affiliation. For example, the Game Show Network, L.P. ("GSN") claims that, as an independent programmer (i.e., a programmer in which no cable operator has ownership interests), it has "faced formidable obstacles in obtaining carriage by cable operators." *Comments of The Game Show Network* at 4; *see also Comments of VIPNA* at 3-4. These commenters offer no empirical evidence in support of their claims that their lack of affiliation with an MSO has impaired their access to any or all systems, including those unaffiliated with programming networks. They also ignore the Commission's findings in its *1995 Competition Report* that the number of independent programmers is growing, and that more than half of the nearly 100 new programming entities that have launched since 1992 are wholly independently owned.[13] *In re Annual Assessment*

[13]Indeed, Table 1 attached to GSN's Comments, which purports to show cable ownership concentration in programming networks with the largest subscriber penetration, fails to account for the rise in the independent programming services in recent years. It is precisely these new, independent programming networks that will be unable to increase distribution if a subsidized leased access rate formula is adopted. If these new networks do not increase distribution, they will never rank among the top programming networks in terms of subscribers.

of the Status of Competition in the Market for Delivery of Video Programming, CS Docket NO. 95-61, 1995 FCC LEXIS 7901 ("1995 Competition Report"); *see also Programmers' Comments*, Exhibit 1. Indeed, the Commission specifically addressed the issue of cable operator interests in programming and found that evidence did not exist to support claims that independent programmers were unfairly disadvantaged. *Vertical Ownership Report & Order* at ¶ 53 ("in the absence of significant empirical evidence of existing discriminatory practices, we see no useful purpose in limiting the ability of cable operators to carry programming affiliated with a rival MSO").

ValueVision also complains that its distribution problems are directly related to its independent status (as opposed to the fact that viewers' needs for shopping channels are already satisfied). *Comments of ValueVision International, Inc.* ("*ValueVision Comments*") at 10. ValueVision advocates a definition of the term "affiliated" that would take into account not only direct, financial investments of cable operators but also the ability of the cable operator to "control or influence the programmer's business affairs" even where cable operators have no financial interest in the programmer. *Id.*[14] ValueVision's proposed definition has no support in the Commission's rules. Indeed, a much more reasonable approach, which would be consistent with the Commission's findings in other contexts including the vertical integration channel occupancy limits, would be the adoption of the attribution criteria in Section 73.3555 of the Commission's rules. 47 C.F.R. § 73.3555 at note 2 ("partnership and direct ownership interests and any voting stock interest amounting to 5%

[14]Tellingly, however, ValueVision, which has carriage affiliation agreements with MSOs, argues self-servingly that such carriage affiliation agreements should not be considered "affiliation." *See ValueVision Comments* at 10.

or more of the outstanding voting stock of a . . . cable television system . . . will be cognizable"). According to the Commission, the attribution criteria in Section 73.3555 were designed to identify all interests that could potentially afford influence or control over management or programming decisions, and thus should be adequate to protect against favoritism for affiliated programmers in the context of leased access as well. *Vertical Ownership Report and Order* at ¶ 62.[15]

B. Carriage Of Start-up Programming Networks On Leased Access Channels Is Consistent With The Purpose Of Section 612

Section 612 states that a designated leased access channel "shall not be used to provide a cable service that is being provided over such system on the date of the enactment of this title, if the provision of such programming is intended to avoid the purpose of this section." 47 U.S.C. § 612. As pointed out by one commenter, the legislative history accompanying Section 612 suggests that this provision was intended to prevent migration of services that existed in 1984 to leased access. *See, e.g., Comments of Center for Media Education, et al.* (*"CME Comments"*) at 13-15. This commenter erroneously asserts, however, that the Commission may rely on that provision to prevent new, start-up networks from being carried in fulfillment of cable operators' leased access obligations, even where such networks are paid by cable operators for carriage.

First, CME's argument is completely inconsistent with the text of the statute. The statute disqualifies (and even then, conditionally) only programming that was on the system when Section 612 was enacted. Section 612 was first enacted in 1984, but was materially

[15]This criterion would also be sufficient to ensure that the cable operator does not exercise editorial control over the content of the programming. *See* 47 U.S.C. § 532(c)(2).

amended in 1992. Thus, to the extent the Commission seeks to limit migration of cable programming to leased access, the very latest cut-off date that the Commission arguably could impose (if it did not adhere to the explicit statutory directive) would be October 5, 1992, the date of enactment of the amendment to Section 612, or May 3, 1993, when the Commission released its original rules implementing leased access. Moreover, the statute specifically provides flexibility regarding a cable operator's carriage of programming on leased access where "the provision of such programming is [not] intended to avoid the purpose of this section." 47 U.S.C. § 612. Migration of quality, start-up programming networks to leased access actually promotes Congress' goal of increased programming diversity.

Approximately 100 new programming networks have launched since May 3, 1993, in reliance upon extant channel availability under the Commission's then-existing rules, and have invested hundreds of millions of dollars in the creation, production and marketing of their programming. *Programmers' Comments*, Exhibit 1. If the Commission were to adopt a subsidized rate formula, it is these programmers that would be bumped. *See Comments of Continental Cablevision, Inc.* at 21 ("no choice other than to displace the most recently launched, least established channels"). Thus, as proposed by Programmers, if the Commission adopts a subsidized rate formula without an adequate transition period, these start-up, quality programming networks should be permitted to migrate to leased access.

Of course, quality programming networks cannot consider the leased access alternative unless cable systems are permitted to pay them for carriage. Unlike shopping channels and infomercials, which are low cost productions and generate a substantial revenue stream from the sale of merchandise, quality programming networks have extremely high production costs